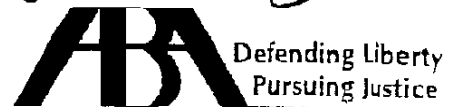


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AMERICAN BAR ASSOCIATION

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October 9, 2001

**VIA HAND DELIVERY
AND ELECTRONIC MAIL**

General Services Administration
Attn: Laurie Duarte
FAR Secretariat (MVP)
1800 F Street, NW, Room 4035
Washington, D.C. 20405

Re: FAR Case 1998-018

**Proposed Rule: Trademarks for Government Products
66 Fed. Reg. 42102- (August 9, 2001)**

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

Mary Ellen Coster Williams, an Officer of the Public Contract Law Section, did not participate in the Section's consideration of these comments, and she abstained from voting to approve and send this letter.

*Rec'd
10/10/01*

Fall Meeting • November 1-3, 2001 • San Diego, CA
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I. Overview of Proposed Rule and Policy Concerns

The proposed rule regarding trademarks for Government products is intended to provide policy guidance and a contract clause that establishes the process for a contractor seeking to assert rights in "Government-unique marks." Generally, the proposed rule would obligate a contractor to provide 120-day advance notice of its intent to assert trademark or servicemark rights in conjunction with goods first developed or manufactured, or services first rendered, in performance of a government contract. Within the 120-day window, the Government could block assertion of those rights by either choosing to assert *its* rights in the mark or merely by objecting to the contractor's proposed assertion.

No prior or existing regulation has addressed the role of trademarks and servicemarks in government contracting. In the Trademark Amendments Act of 1999, however, Congress waived sovereign immunity and permitted, for the first time, the United States and parties acting on its behalf to be liable for trademark infringement and dilution. *See* Pub. L. 106-43, 113 Stat. 219 (codified at 15 U.S.C. § 1114 (Supp. 2001)). Accordingly, consistent with these amendments, the stated policy purposes for the proposed rule are to: (i) avoid liability for trademark infringement and dilution; (ii) avoid restrictions on competition; and (iii) protect agency goodwill.

In light of the Government's potential liability in this area, the Section agrees that policy and guidance are appropriate. The latter two policy purposes, however, are not effectively addressed by restricting or barring the use of trademarks and servicemarks by government contractors, and the first purpose can be effectively addressed by providing guidance for the up-front negotiation of an appropriate license. In addition, the Section is concerned that the proposed process is inconsistent with trademark law and will frustrate contractors' efforts related to their commercial products.

These concerns are addressed below, following a discussion of the relevant principles of trademark law in Section II.

II. Relevant Trademark Principles

Unlike patents, which allow their owners to preempt third parties from making, using, selling, or importing protected inventions -- whether or not the inventions are (or ever have been) in actual use -- trademarks and servicemarks merely designate a single *source* of goods and services that already are being provided to third parties. 35 U.S.C. § 271; 15 U.S.C. § 1127; 1 J. Thomas McCarthy, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 3.3 (4th ed. 2000). Marks do not designate the goods and

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services themselves, and they do not designate the intended or actual consumers. Instead, trademark and servicemark rights derive from the goodwill of the source of goods and services, as well as from the source recognition that the marks facilitate. See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162 (1995) (quoting 15 U.S.C. § 1127).

Trademark and servicemark rights arise at common law to the extent that persons actually are providing services or producing goods in conjunction with a mark (e.g., in the geographic market occupied, for goods/services actually provided, and to the relevant groups of consumers).² See 15 U.S.C. §§ 1065, 1125(a), 1127, 1115; *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992); *Qualitex*, 514 U.S. at 162. Where the Government is a source of goods or services (e.g., where a government research laboratory develops software and then distributes it to third parties), government ownership of associated marks is proper. On the other hand, when a contractor is a source of goods or services (e.g., where a contractor develops software and sell it to the Government), the associated marks belong to the contractor.

Federal trademark and servicemark registrations are a means of expanding the geographic scope of common-law rights to the entire United States and its territories, providing constructive notice of those rights, and availing owners of statutory enforcement options against competitors. Because these are far-reaching benefits, applicants must specify goods and/or services for which they propose to use the mark, and any resulting registrations are restricted to those designated classes. See 15 U.S.C. § 1051(a)(3)(D); 37 C.F.R. §§ 2.32(6-7), 2.86.

Although individuals can file "Intent-to-Use" applications for federal trademark and servicemark registrations, the registrations do not issue (and no preemptive rights are granted) until applicants provide samples establishing that they are using the marks in commerce for all of the proposed goods and/or services. See 15

² For example, without seeking any federal or state registration, a shop on the boardwalk in Ocean City, MD selling saltwater taffy automatically may accrue rights to the mark SALTYPBITES for the goods saltwater taffy and confection sales services in the Ocean City geographic area for the consumer group of beachgoers and tourists. At the same time, a similar candy shop selling saltwater taffy on the boardwalk in Atlantic City, NJ accrues the same rights to the same mark for the same goods and services with respect to the same consumer group — simply in a different geographic area. Simultaneously, a shop selling miniature plastic sharks further down the Atlantic City boardwalk may accrue rights to SALTYPBITES in the same geographic area with respect to different goods and services — toys and toy distribution services — and the same consumer group. The discussion in *Peaches Entertainment Corp. v. Entertainment Repertoire Assoc.*, 62 F.3d 690 (5th Cir. 1995), is instructive on this point.

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U.S.C. § 1051(b)(d); 37 C.F.R. §§ 2.88, 2.89. If such proof is not submitted within three years after an application is approved, the application is abandoned. Therefore, those who do not actually use trademarks or service marks in commerce never accrue any common-law trademark or servicemark rights, and they cannot obtain federal registrations. This is in stark contrast to patents, which can be obtained and enforced based entirely upon "prophetic" examples describing experiments or procedures that the inventor believes could be, but actually have not been, performed. *See Atlas Powder Co. v. E.I. DuPont de Nemours & Co.*, 750 F.2d 1569, 1577 (Fed. Cir. 1985).

Furthermore, even after a trademark or servicemark is registered, third parties may register and/or use the very same mark for different (or even closely related) goods and services if the relevant groups of consumers are not likely to be confused as to the source of the goods and services they encounter.³ *See Peaches Entertainment*, 62 F.3d at 690. This result obtains from the overarching goal of the trademark and servicemark program: protection of the public, which in fact relies upon such marks as indicators of quality. Consistent with this approach, trademarks and servicemarks are involuntarily abandoned and their protection is forfeited when registrants license their marks but do not take affirmative steps to police their use and the quality of the goods and/or services being provided by the licensor (e.g., engage in "naked licensing"). *See Moore Business Forms, Inc. v. Ryu*, 960 F.2d 126, 129 (5th Cir. 1992) (citing *Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1121 (5th Cir. 1991)). Hence, franchisors (e.g., Dunkin Donuts®) typically exert strict quality control over the local companies that operate individual stores.

III. Obstacles Presented By The Federal Trademark System

As discussed below, the fundamental principles of trademark law – and, in particular, the important distinctions between patents and trademarks/servicemarks -- likely will frustrate the Government's efforts to reach its policy goals through the proposed rule. These same distinctions mitigate in favor of substituting guidance and a broad licensing scheme for the proposed rule. The more significant obstacles posed

³ For example, while Lockheed Martin Corporation has registered the mark HERCULES for use in conjunction with "airplanes and structural parts thereof" (Registration No. 1,356,488), Brooks Automation, Inc. has registered the same mark for integrated circuit and semiconductor equipment, Red Wing Products, Inc. has registered the same mark for garment hangers, Congress Financial Corporation has registered the same mark for "dog chew toys" (Registration No. 2,211,270), and Hercules Manufacturing Company has registered the mark for "full and semi-truck trailers and van bodies" (Registration No. 1,385,149).

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by these distinctions, as well as proposed solutions that would enable the Government to achieve its policy goals, are discussed in detail below.

A. *The Government Will Not Protect Its Goodwill By Preventing Government Contractors from Asserting Their Trademark Rights*

The Government and its contractors typically are separate sources of distinct goods and services. Except in certain federal laboratories that develop goods and services, the Government is largely a consumer of trademarked goods and services (e.g., missiles, software, maintenance services) that it does not itself provide in commerce. Thus, Government and contractor goods and services generally will not "overlap" such that confusion as to source would be likely if both use the same or a similar mark.⁴

Accordingly, pre-empting government contractors from using particular marks for their distinct goods and services will not protect an agency's goodwill. Concerns that the Government might be frustrated in its efforts to resell trademarked goods or issue publications referencing goods and services it consumes can be resolved, as they are in commerce, by suitable licenses.

B. *Disparaging Third-Party Activities and Products Will Not Be Addressed or Affected By The Proposed Rule*

The Section understands from proponents of the proposed rule that a primary goal is the prevention of disparaging trademark use by third parties (e.g., use of the mark STEALTH for contraceptive products reportedly offended certain government officials).⁵ Unfortunately, Government trademark rights and registrations will not provide effective means for combating this problem.

⁴ For example, foreign Governments seeking to purchase fighter aircraft are unlikely to believe that the United States Government is manufacturing RAPTOR brand golf clubs or providing parasailing services at California beaches.

⁵ The mark STEALTH has been used for military aircraft and contraceptive devices. Even if the STEALTH mark had been registered to one party for use in conjunction with jet aircraft, an application to register the mark to another party for contraceptive devices and related services likely would have been approved due to the diverse consumer groups served and low probability that consumers would believe jet aircraft and contraceptives originated from the same source. Ironically, federal applications for that mark are pending for vacuum cleaners and banjos. Application Serial Nos. 76/141,805 and 76/190,730.

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Almost invariably, offending (as opposed to infringing) goods and services will differ significantly from those provided in conjunction with a mark by the Government or its contractors. Unlike patents, which give their owners broad powers to pre-empt *any* unapproved use of an invention, trademark and servicemark registrations allow their owners to stop the use of the same or confusingly similar *marks* in conjunction with similar goods and services.⁶ Competitors are free to use the same mark in conjunction with sufficiently different goods and services if consumers would not be confused as to their source.

The Government is unlikely to obtain registrations covering offending uses, because registrations only issue after applicants actually use a mark for each designated class of goods or services. Therefore, unless the Government chooses to first engage in offending uses -- a nonsensical proposition -- it will have difficulty obtaining registrations that clearly pre-empt such uses by third parties. Accordingly, registrations obtained pursuant to assertions of rights under the proposed rule will *not* place the Government in any better position vis-à-vis offending uses.

Instead, the proposed rule may unintentionally inhibit the fight against offending uses. Government contractors engage in commercial activities beyond the scope of their contractual duties, and so accrue trademark rights and registrations far broader in scope than the Government. Not only does this place them in a better position to fight third-party offending uses, it also provides them with a strong incentive to pursue the expensive and time-consuming trademark and unfair-competition lawsuits necessary to do so.

In addition, as a practical matter, contractors are unlikely to engage in disparaging uses that would affect their relationship with Government customer and/or tarnish their own reputation and commerce in related areas. Therefore, the Government is now in the best position it could occupy vis-à-vis offending uses by third parties, and any problematic uses by government contractors, over whom the Government has significant leverage, can be addressed proactively during contract negotiations.

⁶ These comments do not address trademark dilution, a phenomenon not necessarily associated with offensive uses.

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C. *Trademark Ownership By Contractors Does Not Limit Competition*

Contractor ownership of trademarks and servicemarks does not limit competition or affect the development of alternative sources of goods and services. In accordance with the Competition in Contracting Act ("CICA"), except in limited circumstances, federal agencies are required to competitively award contracts in order to increase the sources of products and services and ensure reasonable prices. In the most extreme example, the Government can create alternate sources by providing relevant technical and manufacturing data to competing manufacturers. An original contractor's trademarks and servicemarks could not be shared by competitors, however, because they are specific source designators.⁷

Would-be competitors do not *need* rights to such marks, however, because trademark and servicemark registrations do not preclude others from dealing in the same goods and services. Trademark rights merely preclude others from using the same or confusingly similar *marks* with regard to those goods and services. Therefore, the Government's ability to foster competition pursuant to CICA is not inhibited by contractors' ownership of their trademarks.

IV. *Additional Implementation Issues*

A. *Regulation of Existing, Contractor-Unique Marks or Marks for Non-Government Uses*

The proposed definition of a "Government-unique mark" would include all marks used in conjunction with goods first developed or manufactured, or services first rendered, in performance of government contracts, regardless of their history and scope. Many contractors use a panoply of marks in conjunction with their contract-related activities, many of which are pre-existing and well known in conjunction with other goods and services. In addition, many larger companies have registered their names and developed other marks for general use in conjunction with all goods and services they provide in commerce; these marks are often used in connection with their government contracts.

⁷ For example, the Government developed a second source for the AIM-120 Air-to-Air Missile (AMRAAM), originally developed and manufactured by Hughes Aerospace Corporation, by providing specifications and other manufacturing data to Raytheon Company. Unlike the data and specifications, however, Hughes' trademark and servicemark rights could not be transferred to Raytheon, except with Hughes' express agreement through a license that provided for Hughes' policing of Raytheon's use and the quality of goods furnished.

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Although the Government has no practical interest in these marks, a broad reading of the proposed rule may cover marks already registered by contractors and conceivably would allow the Government to bar or dictate the terms of their future use even outside the sphere of government contracting. Whether or not such restrictions would constitute regulatory takings, they would be untenable for successful companies whose portfolios frequently encompass hundreds, if not thousands, of registered and unregistered marks embodying their companies' national and international goodwill.⁸

In addition, the proposed rule addresses the assertion of trademark and servicemark rights, rather than just the federal registration of trademarks or servicemarks. Because common-law trademark rights accrue from the moment of first use in commerce, the proposed rule could be construed to bar the use of all trademarks in the course of performing any government contract without the prior, express approval of the contracting officer. Thus, the proposed rule also is not, and because of the unique nature of trademarks cannot be, restricted only to goods first developed or manufactured, or services first rendered, in performance of government contracts.

The Section is concerned that the proposed rule neither be applied retroactively to existing marks, nor expanded to non-government uses. Such application would be unfair to contractors and inconsistent with existing trademark law, as well as impose additional burdens on the contracting officers. Although the Section believes that these results were not intended, they illustrate the difficulty and risk involved in trying to apportion commercial source designators away from the actual sources of goods and services. These risks cannot be easily avoided within the proposed notice-and-approval process.

The Section proposes that contractors be permitted to retain title in their trademarks and enter into mandatory licenses that grant the Government trademark and servicemark usage rights analogous to those obtained for inventions and technical data.

⁸ For example, if the Coca-Cola Company first developed a new can for distributing its soft drinks in vending machines under a government contract, and began providing related vending services, a broad reading of the proposed rule would entitle the Government to dictate the terms of future use for all marks used in conjunction with those goods and services — including the company name and the names of all vended soft drinks.

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B. Lack of Government Resources

The Section understands that the Government has only a handful of attorneys for whom trademarks are a significant practice component. Thus, contracting officers will not have ready access to advice regarding contractor requests to register or otherwise assert rights in a mark. The Section is concerned that, without adequate support, contracting officers will be unable to timely respond to contractor requests, and the resulting delays and uncertainty may frustrate contractors' commercial activities, particularly where commercially important marks are at issue. If the FAR instead provided guidance directing the parties to immediately begin negotiating a licensing arrangement, the interests of all parties would be addressed more quickly and effectively.

In addition, the Section is concerned that lack of Government resources will immediately harm government contractors denied the right to obtain and police registrations for commercially important marks. As discussed above, the value of a trademark is only retained if it is effectively policed, both against infringement and to ensure that goods and services provided pursuant to it satisfy quality standards sufficient to justify the public's reliance. In addition, offensive third-party uses will reflect poorly upon all parties involved in the government procurement process -- agencies and contractors alike.

Given the Government's lack of trademark resources, and the need to devote what resources it has to answering contractor requests to assert rights, the Section fears that the Government will not be able to obtain the necessary registrations to protect important marks, police what marks it does obtain, or take effective, affirmative action against third-party uses that reflect poorly upon contractors. Once again, this situation can be avoided by permitting contractors to retain and assert their trademark and servicemark rights, while requiring the parties to engage in licensing negotiations to protect the Government's interests.

C. Government Contractor-Only Coverage

The federal trademark statute, the Lanham Act, already provides adequate means for the Government to object to the registration of marks by any party or to seek to cancel inappropriate registrations. Contractors have business relationships and other customer-relation incentives to ensure that they (i) engage in good faith licensing negotiations regarding marks related to their Government business, (ii) strongly and proactively police important marks, and (iii) oppose offensive third-party uses. The opposition and cancellation procedures implemented by the Lanham Act, and currently used when dealing with third parties, should be more than sufficient with respect to the Government's own contractors.

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The Section is also concerned that the proposed rule would place government contractors at a distinct disadvantage relative to third parties. Specifically, third parties would be free to promptly register marks for a contractor's proposed use (and/or other offensive uses), while government contractors would be required to request the Government's consent and wait for a response.

D. Subcontractor and Vendor Flow-down

The proposed rule does not state whether the requirements of the proposed contract clause are intended to apply to subcontractors and vendors. This result is likely, however, because the proposed clause is to be invoked whenever patent or technical data clauses are incorporated. If flow-down is in fact required, the contracting officers at all federal agencies should be prepared to handle an extraordinarily large volume of requests to use and register trademarks and servicemarks.

The Section is particularly concerned about the burdens that would be imposed upon federal agencies and the likelihood that commercially successful companies will not be willing to risk losing control of their all-important company and brand names simply to participate as subcontractors.

E. International Coverage

The proposed rule is not clear with regard to whether contractors would be required to obtain government consent before submitting trademark and servicemark applications to foreign registration authorities. Regardless of its propriety, if that result is intended, a substantial burden will be placed upon both federal agencies and contractors, as application deadlines in foreign countries often are quite short and the competition to register commercially important marks is intense. Commercially successful companies capable of fulfilling large-scale government contracts generally have global operations; the likelihood that their worldwide commercialization activities could be jeopardized or suspended indefinitely could be severely prejudicial and inhibit companies' willingness to contract with the Government.

V. Proposal for Government-Purpose License Rights

A. Provide FAR Guidance to Contracting Officers and Implement a Compulsory Licensing Scheme

To accomplish the Government's goals, the Section proposes that a mandatory licensing scheme be established that is analogous to the government-purpose rights

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that federal agencies obtain in certain inventions and technical data, while title to trademarks and servicemarks remains with contractors. Under such a scheme, government contractors would be obligated to grant a royalty-free license to the Government to use necessary marks in certain circumstances, including: (i) for morale, recruiting, and public affairs purposes (e.g., on items such as coffee cups and T-shirts); (ii) in official government correspondence; (iii) in government-funded or internally developed training programs associated with products or services; and (iv) in the Foreign Military Sales program. If the Government needed to use a mark in circumstances beyond those prescribed, government contractors would be obligated to engage in licensing negotiations with the agency.

B. Redraft the Definition of "Government-Unique Marks"

If the notice-and-comment process of the proposed rule is retained, the definition of a "Government-unique mark" should be amended to ensure that the only marks subject to regulation are those used solely in conjunction with goods and services first developed or rendered exclusively at Government expense and for Government purposes only (not simply first manufactured or modified from existing commercial or non-commercial products). Contractors frequently modify existing products sold in conjunction with established marks for sale to the Government, which marks embody goodwill entirely unrelated to the Government or government contracting activities. In addition, many government contractors undertake R&D efforts at their own expense that result in products or services provided to the Government and others. Government contractors will be loath to provide such products or services to the Government if other markets exist -- particularly if related marks have become well-known in commerce. In addition, voluntary R&D will be discouraged if the penalty for success is loss of all practical control over company trademarks used in conjunction with resulting products and services.

C. Require Government Approval of Contractor Requests to Assert Rights or an Affirmative Assertion of Trademark Rights Within 120 Days

If the notice-and-comment process of the proposed rule is retained, the proposed rule also should be amended to require that contractor requests be deemed approved at the end of the 120-day period if the Government has not submitted an application to register its own alleged trademark or servicemark rights. Any other scheme would virtually guarantee that the ownership of contractor trademarks would be thrown into doubt and commercialization efforts would be thwarted indefinitely, particularly given the lack of resources and guidance available to contracting officers. This would be a particularly untenable result for successful companies whose businesses extend beyond government contracting -- the very companies the

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Government most wants to attract as its contractors. A non-extendable filing deadline also would cause government agencies to issue denials of contractor requests based upon reasoned analyses of potential trademark rights, rather than a lack of informed guidance from trademark counsel or a vague notion that rights that might somehow become valuable ought to be preserved, or both.

D. Publish the Recommended Licensing Scheme and Guidance in the Federal Register for Review and Comment

The proposed rule regarding trademarks for government products has generated significant discussion within the procurement community, and even the Section's recommended licensing scheme would profoundly affect the commercial practices of many government contractors. Accordingly, as an alternative to the proposed rule, the Section urges the Government to consider a licensing scheme of the type described above and to publish a revised rule in the Federal Register for further public comment.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,



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Chair, Section of Public Contract Law

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